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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 447

NICOLA MASSA,

Petitioner,

—against—

Ca. VENEZUELAN NAVIGACION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order and judgment herein entered the 3rd day of June, 1964.

Opinions Below

332 F. 2d 779—Opinion of Court of Appeals (1a).

298 F. 2d 229—Opinion of Circuit Court of Appeals on prior appeal after first trial (18a).

Jurisdiction

The Court of Appeals order herein was dated and entered June 3rd, 1964.

Jurisdiction of this Court to review the subject order by writ of *certiorari* is predicated on 28 U. S. C. 1254 (1).

Questions Presented

1. Is not the holding by the Court of Appeals for the Second Circuit in the instant case contrary to the holdings by the Court of Appeals for the Third Circuit in the cases of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar S.S. Corp.*, 331 F. 2d 657, and inconsistent with the holding by this Court in *Gutierrez* v. *Waterman*, 373 U. S. 206, 83 S. Ct. 485, in treating with the question of negligently and non-negligently created unseaworthiness proximately causing maritime injuries?

2. Is a trial judge, on a re-trial of the same issues, bound by an oral stipulation entered into by the parties during a prior trial which conclusively established the same fact in issue in both trials?

Laws Involved

New York State Civil Practice Law and Rules:

> "R. 2104 STIPULATIONS. An agreement between parties or their attorneys relating to any matter in an action, *other than one made between counsel in open court*, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." (Emphasis supplied.)

Statement

District Court jurisdiction was based on 28 U. S. C. 1332.

This was a second trial. Prior to the commencement of the trial, the question arose as to whether or not the appellant had the mental capacity to testify on his own behalf.

In support of the contention that appellant did not have such mental capacity, plaintiff called two witnesses, Joseph Massa, his son (Summary, Appendix A), and Filomena Massa, his wife (Summary, Appendix B).

We quote from pages 93 and 94 of the minutes.*

"The Court: I think that you gentlemen want to put a stipulation on the record, do you not, with reference to the testimony in this case of the plaintiff, Nicola Massa?

Mr. Rassner: Yes, your Honor.

May the record show that it is hereby stipulated and agreed by and between counsel for the respective parties hereto that the calling of Nicola Massa to resume the stand is dispensed with, and he is excused from testifying on his own behalf, and that in lieu thereof we will offer in evidence the entire transcript of his testimony on the prior trial to be considered with the same force and effect as if he had so testified in court on this trial.

Mr. Giallorenzi: Defendant and third party plaintiff so stipulate.

Mr. McKernan: And the third party defendant so stipulates."

---

*All references hereinafter refer to pages of the minutes.

Nicola Massa was a stevedore in the employ of John W. McGrath Corporation, engaged in loading the S. S. Ciudad De Cumana on the 24th day of February, 1955, at Pier 10, North River, New York.

A pallet was being hoisted by means of the ship's winch. At the time of the accident, the equipment involved, *i.e.*, the pallet, the bridle and the cable, was dangling in the air attached solely to the ship. The plaintiff was below the material, standing on the pier. When the bridle parted from the pallet, the pallet and its cargo plummeted down upon him, fracturing his left leg and causing other severe injuries.

In each side of the pallet there were two openings or slits which had been cut into the wood for the purpose of receiving flanges attached to a metal bar. The bar was part of a bridle consisting of four wires, one attached to the bar at each corner of the pallet. The bridle was the final portion of the cable extending over the ship's side from the ship's winch.

The plaintiff testified that he had finished hooking up the draft when the accident occurred. He stated that the draft "went up about nine, ten feet up, the pin, the bridle come off the pallet and he come down. It hit on me. So I went down and I got hit and I can't get up. I was unconscious for fifteen minutes or so. Then they take me to the hospital."

Plaintiff explained that the pallets came already loaded to his place of work. He and three others served only to hook the pallet to the bridle so that the pallet could be lifted to the ship. The pallets were hooked to the bridle by the insertion of two prongs on each side in the holes provided therefor in the sides of the pallets.

The plaintiff stated that "Sometimes the hole is no good, and then they slip out."

Plaintiff specifically stated that the pallet which injured him went "straight up" after he and the three others attached it to the bridle. Plaintiff stated he saw the bridle come off the pallet and that the pallet then fell down. He stated this occurred after the pallet had been hauled up by the ship's cable about ten feet.

Plaintiff's contention was corroborated by two fellow longshoremen, Louis DeMeo and Frank Marrocolla.

The medical proof supported plaintiff's contention that his injuries resulted in permanent disability.

Both Venezuelan and McGrath admitted that the "top" pallet fell, but contend that on the basis of observation "after the accident," the "inference" may be drawn that the pallet fell by reason of the manner of the work and not by reason of a defect in the pallet.

The evidence relied on for this contention is that the top pallet, which was examined shortly after the accident was free from any defect and perfectly safe, sound and adequate for the purpose intended.

The circumstances and positioning of the pile of pallets and the bridle constituted facts from which the inference can be drawn that the stevedores affixed one bar of the bridle by inserting the flanges in the slots on one side of the top pallet, but into slots of the pallet below the top one on the opposite side.

The pallet involved in the accident was one of a pile of four.

The pallet testified to by the defendant's witnesses was one of a pile of three.

If there were four pallets before the accident and only three after the accident, obviously the pallet involved in the accident had been removed, as established by the testimony of plaintiff and his witnesses.

The basis for plaintiff's contention that defense testimony concerned a pallet unrelated to the accident is the following excerpt. This is a stipulation during plaintiff's testimony in the prior trial, in evidence in this trial.

> "Mr. Rassner: We can agree for the record that there were three empty pallets piled one on top of the other?
>
> The Court: On the platform?
>
> Mr. Rassner: On the platform. The hi-lo brought a loaded pallet and placed—and the several men, four in number, as far as I can find out from the investigation, physically lifted the pallet with the cargo, and put them on top of the three empty pallets, and that is when they hooked them up.
>
> The Court: Then they hooked it up. Do we agree to that?
>
> Mr. McKernan: Yes. That is, prior to the accident, shortly prior thereto.
>
> Mr. Rassner: Yes.
>
> Mr. Giallorenzi: Yes.
>
> Mr. Rassner: We agree.
>
> Mr. McKernan: I will agree.
>
> The Court: Thank you."

To obviate any question but that the pallet involved in the accident was a fourth pallet not present at the time defense witnesses appeared at the scene of the accident, is established by the following further excerpt from the stipulation during plaintiff's testimony in the prior trial, in evidence in this trial.

"The Court: All I am concerned with is this: as to the pallet which we call number *four*, was placed on the pile, was it ready to be hoistsed, or did something have to be done before it was hoisted?

Mr. Rassner: We all agree that we had to put the plugs in, and that is the two aluminum bars, each aluminum bar having two plugs, aluminum plugs, and that his job, we will further stipulate was to assist in putting help put the aluminum bars into the pallet." (Italics ours)

Objection was duly taken but overruled and testimony was accepted as to the third pallet.

This testimony was clearly intended to describe the pallet involved in the accident.

Jacques Wagemaker, McGrath's superintendent, was permitted, over plaintiff's objection, to testify as to the "third" pallet which he saw after the accident (494).

"The Court: I am sure we are talking about the same pallet? The top pallet of the pile. The top pallet of the pile, that is, three. Three pallets, one on top of the other?

The Witness: Yes, your Honor."

* * *

(495, 496)

"Q. Describe the pallet that you saw. A. As I said before, it was a pile of pallets in disarray which the two top pallets were in disarray. The pallet facing the bar with tongs, and facing the forward end of the ship was inserted in the top pallet, and the second bar facing the after end of the ship was inserted in the second pallet.

Mr. Rassner: I ask that the answer be stricken as not relating to the pallet in question."

* * *

(496, 497)

"The top pallet had some cargo on. A few cartons.

The Court: I don't quite get the picture yet.

These two pallets that you have referred to was one on top of the other?

The Witness: Yes, your Honor.

* * *

(497, 498)

"The Witness: No,—the top pallet, if I might describe the side on which the bar was inserted? That was the bar facing the forward end of the ship.

That was inserted into the top pallet. The bar facing the after end of the ship was inserted in the second pallet and partially inserted in there.

Mr. Rassner: Now, may I reserve my right to move to strike his testimony because he has testified in the prior trial, and my objection is that he did not actually see the pallet in question.

The Court: I don't know yet—."

When Wagemaker came to the scene of the accident, he saw the following:

(501, 502)

"The Witness: There were an original pile of two pallets. The cargo pallet with the cargo is placed on top of this pile which makes it three pallets.

The Court: All right, and there were how many when you went there?

The Witness: Three.
So the top pallet is the third pallet.
The Court: So, there were three?
The Witness: Yes."

He further testified as follows:

(604)

"Q. Now, you didn't see the pallet fall, did you? A. No, sir.

Q. And when you got there, the pallet that you saw was the third one on other pallets, is that right? A. The third one on top of other pallets?

Q. There were two pallets, and the one that you saw was the third one? A. Yes.

Q. And that one was loaded with cargo when you got there? A. Yes, and the gear was resting on top of it."

George John Paul Lucas, employed by A. H. Bull Steamship Company as vice president in charge of terminals, testified that he arrived at the scene of the accident after its occurrence.

He was permitted to testify over plaintiff's objection, in spite of the fact that he admitted that he didn't know whether the pallet he was describing was the one involved in the accident (616). He did not see the pallet involved in the accident, for when he got there, there were only three pallets there.

(638, 639)

"The Court: You went over to the stringpiece, you saw some pallets there?
The Witness: That's right.
The Court: How many?

The Witness: Three.
The Court: One on top of the other?
The Witness: That's right.
The Court: In order?
The Witness: No. After I attended to Massa, I then proceeded to the stringpiece, and there were three pallets which had been placed in order."

There was no testimony to support the contention of the respondent and respondent impleaded that the stevedores inserted prongs into the slots on one side of the top pallet, and on the opposite side in the slots on the pallet below the top pallet.

The Court's finding of fact was based on respondent's unproven contention and not on any testimony which had probative value.

The testimony as to the positioning of the bridle and its appurtenances after the accident does not have any probative value, for by that time the fourth pallet which was, by stipulation, present at the time of the accident had been removed.

The respondent failed to call or explain the failure to call various people who concededly were eye witnesses to the accident; failed to have any log entry as to the accident; failed to call anyone or produce any records as to broken or defective pallets brought to the "hospital pile" on the day of the accident; failed to produce any accident report of the hatch boss who was at the scene of the accident.

The defense tended to and did mislead the learned Court below into believing that the pallet involved in the accident was the third pallet. The third pallet was not involved in the accident, as the pile consisted of four pallets, not three, and the third pallet became the top pallet when the defective pallet was removed from the scene.

Appellant sustained his burden of proof as to liability.

The fact that the pallet fell with resultant injury to the appellant, constituted sufficient evidence of breach of warranty of seaworthiness, in the light of the uncontradicted evidence that the pallet was being used in the usual manner and normal fashion.

Part of appellant's testimony was supplied by way of stipulation.

In lieu of the appellant testifying as to the number of pallets which composed the base or pile of pallets, the following evidentiary matter was conceded and became part of the appellant's testimony in the prior trial.

We quote the precise stipulation, which appears at pages 36, 37 and 50 in the minutes of the prior trial.

> "Mr. Rassner: We can agree for the record that there were three empty pallets piled one on top of the other.
>
> The Court: On the platform?
>
> Mr. Rassner: On the platform. The hi-lo brought a loaded pallet and placed—and the several men, four in number, as far as I can find out from the investigation, physically lifted the pallet with the cargo, and put them on top of the three empty pallets, and that is when they hooked them up.
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> Mr. Giallorenzi: Yes.
>
> Mr. Rassner: We agree.
>
> Mr. McKernan: I will agree.
>
> The Court: Thank you."

"The Court: All I am concerned with is this: as to the pallet which we call number four, was placed on the pile, was it ready to be hoisted, or did something have to be done before it was hoisted?"

This stipulation is in evidence as part of the cross examination, within the specific designation, as appears at page 94 of the minutes in the present trial.

It was stipulated that the entire transcript of the testimony of the appellant in the prior trial, be considered with the same force and effect as if the appellant had testified at this trial (93, 94).

To obviate any question as to just what the transcript should include, it was specifically stated at page 94 that pages 2 to 17, and pages 17 to 83 of the prior testimony are the pages that would be included as evidence in this case.

Within these pages and specifically at pages 36, 37 and 50 is the stipulation as to the conceded facts. These facts were conceded as a substitute or in lieu of the appellant testifying thereto.

Reasons for Granting the Writ

Re: The First Question Presented.

The two Circuits, the Second and Third, carrying the major burden of maritime litigation in ths country are in direct conflict with each other as to the proper standard to apply in determining liability for maritime accidents proximately caused by negligent and non-negligent stevedore operations.

Not only is the Court of Appeals for the Second Circuit in conflict with the Third, as aforesaid, but in addition thereto, the holding in the instant case is inconsistent with

the holding of this Court in the case of *Gutierrez* v. *Waterman*, *supra*, p. 2[1].

The present situation does violence to the American concept of equal justice to all, in that cases tried in one district result in an award of damages against a shipowner, whereas on the identical facts, the shipowner is granted immunity from liability if tried in another district.

To permit this unsettled state of the law to continue without clarification and settlement by this Court would encourage injured workers and or their dependents to shop around for a more favorable forum in which to litigate their rights and thus inevitably result in unequal administration of justice on identical factual situations.

This lack of uniformity, which presently exists, merits clarification by this Court, not only in the interest of the victims of maritime disasters but, likewise, to establish the nature and extent of a shipowner's obligations. The desire for uniformity in treating with maritime problems is important to all parties concerned with maritime accident

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[1] There is also an intra-circuit conflict which merits this Court's review.

This Court has granted *certiorari* to bring about uniformity within a Circuit.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221; *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322.

As to the intra-circuit conflict in the Second Circuit, see also:

Pinto v. *States Marine Corp.*, 296 F. 2d 1, *en banc* hearing denied, dissenting opinion by CLARK, C.J., SMITH, C.J. concurring in dissent, cert. den. 369 U. S. 843, rehearing denied, 369 U. S. 891; *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215; CLARK, C.J., dissenting, cert. den. 369 U. S. 843, rehearing denied, 369 U. S. 891.

liability throughout the nation. The fact that this question is of national importance to the entire industry is highlighted by the fact that opposing interests are asking this Court, as is this petitioner, to clarify and settle the question presented. See petitions for certiorari pending in *Swedish American Lines* v. *Ferrante* (No. 275, Oct. Term, 1964) and *Calmar S. S. Corp.* v. *Thompson* (No. 398, Oct. Term, 1964).

Shipowners' interests in the two above cited petitions, *supra*, state that the decision in the instant case is in conflict with holdings by other courts in *Blankenship* v. *Ellerman's Wilson Line* (4 Cir.), 265 F. 2d 455, and *Arena* v. *Luckenbach S. S. Co.*, (1 Cir.), 279 F. 2d 186, cert. den. 364 U. S. 895.

Re: The Second Question Presented.

It is of importance in the trial of all cases in all Federal courts to settle the law of evidence as to what force and effect is to be given to stipulations made by counsel, during a prior trial, as to a factual matter stipulated to in open court.

This case was tried in New York State and the holding by the trial court, affirmed by the Court below, is contrary to well-established law that a Federal court is bound to follow the law of the of the State in which it sits as to rules of evidence. This question comes within the concept of this Court's supervision of Federal practice and procedure, and merits review and clarification.

Stiplations are of basic importance in clarifying issues and shortening litigation: are of the highest calibre of proof and merit this Court's stamp of approval as such.

POINT I

The holding of the Court below is inconsistent with this Court's prior decision.

The decision in the instant case has applied principles of law in a manner inconsistent with that given by the Supreme Court of the United States in the case of *Gutierrez* v. *Waterman*, 373 U. S. 206, 83 S. Ct. 1185.

The court below was in error in relying on the principle of control which is inconsistent with the holding in *Gutierrez, supra.*

POINT II

Inter-Circuit conflict merits this Court's certiorari review.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221;
Dickinson v. *Petroleum Conversion Corp.*, 338 U. S. 507.

The decision below is in conflict with the holding by the Third Circuit in the cases of *Ferranie* v. *Swedish American Lines*, 331 F. 2d 571, and *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657.

The court below, contrary to the above holdings, predicated its decision on control, of the accident-causing mechanism, by the stevedore and the negligence of the plaintiff and his fellow-workman.

The decision below, therefore, destroys the uniform application of principles of maritime law.

POINT III

Intra-Circuit conflict merits this Court's certiorari review.

The court below has enunciated a radical principle of law in conflict with its prior holding in *Grillea* v. *U. S.* (2 Cir.), 232 F. 2d 919, approved by this court in *Reed* v. *Yaka*, 373 U. S. 410, 83 S. Ct. 1349.

The holding by the court below makes proof of negligence a necessary element to establish liability, even in actions where no negligence is pleaded or attempted to be proved but where liability is predicated exclusively on breach of warranty of seaworthiness, as in the instant case.

POINT IV

Certiorari review is necessary to re-establish and maintain the desired uniformity of the General Maritime Law.

The decision by the court below destroys the uniformity of the maritime law. It is inconsistent with the holding in the *Gutierrez* case, *supra*; conflicts with the decisions in the Third Circuit in *Thompson*, *supra*, and *Ferrante*, *supra*; conflicts with the prior decision in its own circuit in *Grillea*, *supra*, and, in addition thereto, has injected into maritime law the need of proving negligent causation of unseaworthiness and control by the shipowner as conditions precedent to impose liability for breach of warranty of seaworthiness.

This places an unwarranted burden upon personal injury victims, and next of kin in fatal accidents, and encourages the shopping around for a more favorable forum.

POINT V

Stipulation by counsel during trial as to a fact conclusively proves the fact and estops party from denying truth thereof in later re-trial.

The court below was in error in that it sustained the holding of the trial court which failed to give effect to a stipulation made during a prior trial as to a substantial and material fact in issue in both trials.

The law is well settled that a Federal Court will apply the rules of evidence of the State in which it sits. F.R.C.P. 43(a); 28 U.S.C. 1652; *Mass. Mut. Life Ins. Co.* v. *Brei* (2 Cir.), 311 F. 2d 463, 470; N. Y. State CPLR 2104 (*supra*, p. 2).

In the case at bar, the court below erroneously sanctioned the failure of the trial court to give effect to an oral stipulation entered into by counsel for the parties in open court during a prior trial.

The stipulation was binding and conclusively established the fact that 4 pallets were in use at the time of plaintiff's injury, whereas the trial court, on the re-trial, rejected this factual stipulation which was determinative of the basic question of unseaworthiness. N. Y. State CPLR 2104.

The stipulation estopped the respondent from contending to the contrary thereof and the trial court was bound by the same principle of estoppel. *Lawrence* v. *Veil*, 166 F. S. 777, 784; *Helvering* v. *Schine Chain Theatres, Inc.* (2nd Cir.), 121 F. 2nd 948, 950; *Arizona* v. *Copper Queen Mining Co.*, 283 U. S. 87, 95, 54 S. Ct. 546, 549; *Dickerson* v. *Colgrove*, 100 U. S. 578, 580; CPLR 2104.

POINT VI

Court of Appeals sanction of lower Court's departure from accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

See Point V, *supra*, p. 17.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, certiorari review is merited herein in order to maintain the uniformity of the general maritime law and in the exercise of this court's power of supervision over practice and procedure in the federal courts in respect to evidentiary value of counsels' stipulations as to facts in issue.

Wherefore, petitioner respectfully prays that this court's writ of certiorari will issue to the United States Court of Appeals for the Second Circuit to review its subject order and judgment and further prays that, on certiorari being granted, this court will reverse the order of the court below.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX A

Opinion of United States Court of Appeals

Before LUMBARD, Chief Judge, and MOORE and SMITH, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge.

Massa, the plaintiff longshoreman, was injured when a pallet being used to load the ship spilled some of its cargo on him. After a jury failed to reach a verdict, the United States District Court for the Eastern District of New York, Mortimer W. Byers, J., dismissed the complaint against the shipowner, C. A. Venezuelan Navigacion, on the ground that the plaintiff had failed to prove a prima facie case. This court reversed and remanded for a new trial, for viewed in the light most favorable to the plaintiff, the evidence was sufficient to support a finding of unseaworthiness. 298 F. 2d 239 (1962). Upon remand, the case was tried before Chief Judge Joseph C. Zavatt, sitting without a jury, who found that the accident was not caused by a defective pallet but by the negligence of the plaintiff and his fellow longshoremen. Concluding that the ship was seaworthy and the shipowner free from negligence, the District Court dismissed the complaint and the third party complaint of the shipowner against the stevedore John W. McGrath Corporation. 209 F. Supp. 404 (1962). The plaintiff now appeals from the dismissal of his complaint, and the shipowner appeals from the dismissal of his third party complaint to recover counsel fees for defending the suit. We find no error in the ruling on the longshoreman's claim and affirm the dismissal of the

complaint, but we reverse the dismissal of the third party complaint and direct the entry of a judgment awarding counsel fees and expenses to the third party plaintiff.

On February 25, 1955 the plaintiff was employed by the stevedore, then engaged in loading cargo onto the defendant's ship. Some of the cargo consisted of cases of lube oil cans, which were loaded evenly on rectangular wooden pallets. Each loaded pallet was brought to the side of the ship by a hi-lo and placed on a platform of two empty pallets, stacked one above the other to facilitate the task of the longshoremen who hooked up the loaded pallets to the ship's gear. The pallet was connected to the winch by a cable and a pallet bridle, which consisted of four wires joined at the top and spreading downward to connect with the ends of the two metal bars. Each of the metal bars was equipped with two protruding metal tongs that fitted into apertures on the ends of the pallet.

The plaintiff was a member of a four man gang of longshoremen whose job was to insert the tongs into the pallet holes. The plaintiff was injured when some of the cargo spilled from a pallet that had been raised about eight feet by the ship's winch. The plaintiff claimed that the accident was caused by the rotting of the wood around the pallet hole, a defect that resulted in the tongs slipping out of the pallet holes. However, the trial court found that the accident was caused by the plaintiff and his fellow longshoremen inserting the tongs into the apertures in the empty pallet lying immediately beneath the loaded pallet into which they were supposed to insert the tongs. Thus, one of the metal bars was connected to the top pallet and the other connected to the empty pallet of the platform beneath.

Appendix A

I.

On this appeal the plaintiff claims that the findings of the trial court must be set aside as clearly erroneous and that the testimony of the defendant's witnesses must be disregarded because the parties at a previous trial had stipulated that there were three empty pallets stacked together as a platform. Since the trial court found that there were only two empty pallets in the supporting platform, the plaintiff claims that the court below must have been hoodwinked into believing that the plaintiff's witnesses and defendant's witnesses were all describing the same pallet. The basis of this contention is that "the only inference justified by the evidence was that the defective pallet was removed from the scene of the accident and that the witnesses who testified on behalf of the respondent did not see and knew nothing about the condition of the pallet involved in the accident."

[1] This argument is nothing but vain imaginings. There is not a shred of evidence that anyone spirited away the pallet involved in the accident before the defendant's witnesses arrived at the scene, and there is substantial testimony to the contrary. The defendant's witnesses described the pallet partially loaded with cans of lube oil, and it is clear from the record that the pallet they were describing was the one alleged by the plaintiff to be defective. There was no stipulation at this trial that there were three pallets in the supporting platform. Because the parties unfortunately stipulated to the presence of three empty pallets in the platform at a previous trial during the plaintiff's cross-examination does not mean that they stipulated to such effect when they agreed that the plaintiff, for medical reasons, would be excused from testifying and that his prior testimony would be accepted into evidence.

[2-4] There is no conflict between this court's earlier decision in this case and the result reached by the District Court. We remanded the case for a trial on its facts because the plaintiff had alleged sufficient facts, if proven, to entitle him to a verdict. But the plaintiff failed to prove these facts. The only witness to testify that the wood around the pallet holes had rotted was Marrocolla, and the trial court was not obligated to credit his testimony, particularly since it conflicted with his prior testimony and the testimony of the defense witnesses. Nor can we say that the plaintiff and his co-worker had rendered the ship unseaworthy by placing the tongs in the wrong holes. The doctrine of unseaworthiness requires no more than that a ship and appurtenances be reasonably fit for their intended use, and the trial court was justified in concluding that the pallets were reasonably fit. See Hooper v. Terminal Steamship Co., 296 F. 2d 281 (2 Cir. 1961); Pinto v. States Marine Corp. of Del., 296 F. 2d 1 (2 Cir. 1961), cert. denied 369 U. S. 843, 82 S. Ct. 874, 7 L. Ed. 2d 847 (1962).

II.

[5-7] There is considerably more merit to the shipowner's appeal, and we think the District Court erred in dismissing the third party complaint. If the stevedore fails to use reasonable care in handling equipment or cargo, resulting in foreseeable or potential loss to the shipowner by rendering it likely to suit, the stevedore has breached its warranty of workmanlike service. Paliaga v. Luckenbach Steamship Co., 301 F. 2d 403, 408 (2 Cir. 1962); Damanti v. A/S Inger, 314 F. 2d 395, 397 (2 Cir. 1963), cert. denied, Daniels & Kennedy, Inc. v. A/S Inger, 375 U. S. 334, 84 S. Ct. 46, 11 L. Ed. 2d 64 (1963). The stevedore is obligated to indemnify the shipowner for any loss in-

curred because of the stevedore's breach of its warranty of workmanlike service, and this obligation extends to the litigation expenses of defending suits brought against the shipowner. Nicroli v. Den Norske Afrika, 2 Cir. 1964, 332 F. 2d 651; Paliaga v. Luckenbach Steamship Co., supra; Guarraccino v. Luckenbach Steamship Co. v. Turner & Blanchard, Inc., 2 Cir. 1964, —— F. 2d ——. There is no question that the stevedore breached its warranty to perform in a workmanlike manner, for the trial court found that the cause of the accident was the negligence of the stevedore's employees. This negligence rendered the shipowner liable to suit, and we see no good reason for forcing the shipowner to bear the expenses of successfully defending the suit when the stevedore would have to bear the shipowner's expenses of unsuccessfully defending the suit. Such a rule would place a premium on losing lawsuits. In Paliaga v. Luckenbach Steamship Co., supra, this court held it an abuse of discretion to dismiss a third party complaint for the shipowner's counsel fees where the stevedore had settled with the plaintiff longshoreman. As the Fifth Circuit correctly observed in Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V., 324 F. 2d 746, 747 (5 Cir. 1963), cert. denied, 84 S. Ct. 1219 (1964), the case for the shipowner in this situation is stronger than it was in Paliaga. The isolated cases which have refused to award counsel fees to the shipowner in this situation have been sharply criticized; one has even been repudiated by its author. Bielawski v. American Export Lines, 220 F. Supp. 265 (E. D. Va. 1963). The better reasoned cases support the award of counsel fees to the successful shipowner. Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V., supra; Gonzales v. Penna. Railroad Co., 183 F. Supp. 779 (S. D. N. Y. 1960). The burden is best

placed on the stevedore who can minimize expense and injury by insisting on greater safety precautions, Guarraccino v. Luckenbach Steamship Co., supra.

We hold that the District Court abused its discretion in failing to permit the recovery of counsel fees on the third party complaint.

Inasmuch as the parties have agreed that the $6,600 in counsel fees expended by the shipowner is fair and reasonable, we direct the entry of judgment against the stevedore for that amount plus disbursements of $999.81, making a total judgement of $7,599.81. Since part of the shipowner's efforts on appeal were devoted to resisting the claims of the plaintiff, we also tax the stevedore $300 for reasonable attorney's fees on that portion of the appeal to be paid to counsel for the shipowner. Nicroli v. Den Norske Afrika, supra; Guarraccino v. Luckenbach Steamship Co., supra.

The order dismissing the complaint is affirmed. The order dismissing the third party complaint is reversed and the entry of judgment for the third party plaintiff is ordered.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of June, one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges.

NICOLA MASCA,
Plaintiff-Appellant,

vs.

C. A. VENEZUELAN NAVIGACION,
Defendant and Third Party
Plaintiff-Appellant,

vs.

JOHN W. McGRATH CORPORATION,
Third Party Defendant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and is hereby is affirmed.

It is further ordered, adjudged and decreed that the order dismissing the third party complaint be and it hereby is reversed with directions that a judgment against the third party defendant-appellee, John W. McGrath Corporation, be entered in the sum of $7,599.81 for the third party plaintiff-appellant, C. A. Venezuelan Navigacion, and in the sum of $300. for counsel to said shipowner in accordance with the opinion of this court with costs to the third party plaintiff-appellant.

A. Daniel Fusaro,
Clerk.

APPENDIX C

Opinion, Findings and Conclusions of United States District Court on Re-Trial

U. S. District Court
Eastern District of New York
209 F.S. 404

Zavatt, Chief Judge.

The plaintiff, a longshoreman in the employ of the third party defendant, McGrath, seeks damages for personal injuries on the ground of the alleged negligence of the defendant, the owner and operator of the SS Ciudad De Cumana, and on the ground that said Vessel was unseaworthy. By a pre-trial order, dated December 7, 1960, the plaintiff limited the issues of alleged negligence and unseaworthiness to an alleged defective pallet.

During a previous trial, the trial judge granted the defendant's motion to dismiss the complaint and the third party defendant's motion to dismiss the third party complaint after the jury disagreed. On appeal to the Court of Appeals of this Circuit, the judgments of dismissal were reversed and the claims of the plaintiff and the third party plaintiff was remanded for re-trial. Mass v. C. A. Venezuelan Navigacion, 298 F. 2d. 239 (2d Cir. 1962).

The second trial was tried to the court without a jury on the theory that a proximate cause of plaintiff's personal injuries was a defective pallet, the use of which in the loading of the vessel constituted negligence on the part of the defendant and rendered the defendant's vessel unseaworthy. In view of the findings of fact and conclusions of law herein, it is unnecessary to discuss the claim over of the defendant against the third party defendant.

Appendix C

Findings of Fact.

The court makes the following findings of fact based upon the credible evidence and the court's view of a loading operation during the trial with the knowledge and consent of the parties and their attorneys and in the presence of said attorneys:

1. On February 24, 1955, the SS CIUDAD DE CUMANA, owned, operated, managed and controlled by C. A. Venezuelan Navigacion, the defendant and the third party plaintiff, was berthed at Pier 10, North River, within the Eastern District of New York, for purposes of taking a cargo.

2. On February 24, 1955, the third party defendant was loading cargo into said vessel pursuant to a stevedoring contract with the defendant and third party plaintiff. The entire loading operation was under the control of the third party defendant.

3. In connection with said loading operations, the third party defendant supplied longshoremen, supervisors, hatch bosses, gangwaymen, hi-lo drivers, gearmen, and assembly known as "pallet bridle" and wooden cargo handling platforms, known as pallets.

4. The "pallet bridle" consisted of a "spreader," a square or rectangular shape metal frame; four wire lines of equal length, known as legs, each extending down from a corner of the "spreader"; two bridle bars made of steel and aluminum, each of which had attached to it two metal protuberances known variously as "plugs", "flanges", "prongs" or "tongs" (which will be referred to herein as "tongs"). The wire "legs" were attached to shackles at the respective ends of the bridle bars. The pallet bridle

was connected to a winch aboard the vessel by means of a ship's cable.

5. The "pallets" measured approximately 5 feet 6 inches in length by 3 feet 4 inches in width. The top and bottom of each pallet were identical—each consisting of a series of parallel slats. The top and bottom of each pallet were separated by four horizontal wooden "cross pieces." Two "cross pieces" served as interior supports. One was located at each end of the pallet. Each end cross piece had two apertures known as "pallet holes" into which the tongs of the pallet bars are inserted when a pallet loaded with cargo, a draft, was to be lifted from the dock to the ship.

Loaded pallets were brought to the side of the ship by means of a hi-lo owned and operated by the third party defendant and were placed upon a platform which consisted of two pallets superimposed one above the other. This platform was so used for the convenience of the four man gang of longshoremen who were to hook up the pallet bridle to the draft or loaded pallet.

Loaded pallets were brought to the side of the ship by means of a hi-lo owned and operated by the third party defendant and were placed upon a platform which consisted of two pallets superimposed one above the other. This platform was so used for the convenience of the four man gang of longshoremen who were to hook up the pallet bridle to the draft or loaded pallet.

7. The pallet bridle was hooked up to the draft by inserting the two tongs of one pallet bar into the two pallet holes at one end of the pallet and the two pallet holes at the other end of the pallet. Each member of the four man gang inserted one tong into one pallet hole. During the

hookup operation, therefore, two members of this gang stood at one end of the platform and the loaded pallet and two members of the gang stood at the other end.

8. At about 11 P.M. on February 24, 1955, a hi-lo owned and operated by the third party defendant placed upon the two-pallet platform a pallet loaded in an even manner with approximately 36 cases of lube oil cans in cartons weighing about one ton.

9. The plaintiff and one Gambardela, a member of the gang, stood at the aft end of the pallet (with reference to the ship). The two other members of the gang, Di Meo and Marrocolla, stood at the forward end.

10. Di Meo and Marrocolla placed the tongs of one pallett bar into the forward pallet holes of the loaded pallet. The plaintiff and Gambardella placed the tongs of the other pallet bar into the aft pallet holes of the pallet immediately below the loaded pallet.

11. In response to a signal from Di Meo and gangway man, the draft was raised by a winch aboard the ship about 8 feet, when some of the cargo spilled from the pallet toward the aft end of the pallet and some of that cargo struck and injured the plaintiff.

12. A few minutes after this accident, the bridle was in a lowered position on top of the said pallet and the pallet, with about a dozen of the cartons still on it, was resting on the platform. The two tongs of the forward pallet bar were fully inserted in the forward pallet holes of the top pallet. The two tongs of the aft pallet bar were partially inserted in the aft end of the pallet immediately below.

Appendix C

13. The top pallet was examined, reloaded with the same cargo; the tongs were properly inserted in the pallet holes at either end by a gang of four longshoremen (not including the plaintiff) and the re-loaded pallet was hoisted in to the ship.

14. The pallet bridle and the loaded pallet hooked up thereto and the pallet improperly hooked up were free from all defects; were reasonably fit for their intended use, i.e., were seaworthy in all respects and neither caused nor contributed to the plaintiff's injury.

15. The defendant was not negligent nor was the vessel unseaworthy.

16. The plaintiff's injuries were caused solely by his own negligence and that of a fellow longshoreman. By inserting the pallet bars improperly, as found above, they caused the loaded pallet to be lifted unevenly thus causing the cargo to spill on the side of the pallet where the plaintiff was standing and to strike the plaintiff and cause him bodily injury. The defendant had no knowledge of nor was he chargeable with knowledge of this fact.

(1-6) Stevedores, when performing "the ship's service," are entitled to the same protection against unseaworthiness as members of the crew doing the same work.[1] This pro-

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[1] This doctrine of seaworthiness, finally settled as to seamen in the Osceola, (1902), 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 was extended to longshoreman injured aboard ship by Seas Shipping Co. v. Sieracki, (1946), 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, and further extended to longshoremen injured on the docks (under certain circumstances) by Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (2d Cir. 1950), cert. denied (1951) 341 U. S. 904, 71 S. Ct. 614, 95 L. Ed. 1343. These extensions of the doctrine were originally based upon the belief that, historically, the work of loading and unloading a vessel was the work of the vessel's seamen. Contra, Tetreault Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Corn. L. Q. 381 (1954).

tection against unseaworthiness imposes upon the owner of the vessel a nondelegable duty to provide a seaworthy vessel (including appliances appurtenant thereto brought on board by the stevedore) and a competent crew.[2] Stevedores themselves may render a ship pro tanto unseaworthy and thereby impose liability upon the owner of the vessel for injuries they sustain.[3] Under appropriate circumstances, recovery may be had by those working on shore.[4] Liability attaches for a temporary as well as a permanent unseaworthy condition. Mitchell v. Trawler Racer, Inc. (1960), 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d. 941. The duty to furnish a seaworthy vessel does not impose a duty to furnish one that is accident free but, rather to furnish:

"... a vessel and appurtenances reasonably fit for their intended use. The standard is not 'perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.'" Mitchell v. Trawler Racer, Inc. (362 U. S. at 550, 80 S. Ct. at 933).

(7, 8) Since all of the appliances involved in the accident, including the pallet, were seaworthy, the plaintiff may not recover. The doctrine of unseaworthiness has not yet been extended to allow recovery for injuries caused by the

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[2] Pondoni v. Lykes Brothers Steamship Co. (1955), 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354; Mahnich v. Southern S.S. Co., (1944), 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561; Alaska Steamship Company v. Petterson (1954), 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798.

[3] Grillea v. United States, 232 F. 2d 919; Rich v. Ellerman & Bucknall S.S. Co., 2 Cir., 278 F. 2d 704.

[4] See Fn. 2.

contemporaneous negligent usage of seaworthy appliances. Billeci v. United States, 298 F. 2d 703, 705 (9th Cir. 1962); Morrell v. United States, 297 F. 2d. 662 (9th Cir. 1961); Williams v. The SS Richard De Larrinaga, 287 F. 2d. 732 (4th Cir. 1961); Blankenship v. Ellerman's Wilson Line New York, Inc., 265 F. 2d. 455 (4th Cir. 1959); Peñedo Cia Naveria S.A. v. Maniatis, 262 F. 2d 28 (4th Cir. 1959); Imperial Oil, Lt. v. Drlik, 234 F. 2d. 4 (6th Cir. 1956); Berti v. Compagnie De Navigation Cyprien Fabre, 213 F. 2d. 397 (2d Cir. 1954); Grillea v. United States, 232 F. 2d. 919 (2d. Cir. 1956).

On cases presenting similar fact situations liability for unseaworthiness has been denied. In Arena v. Luckenbach Steamship Co., 279 F. 2d 186 (1st Cir. 1960), the plaintiff, a longshoreman, improper loading caused a loading board to tip, spilling rolls of paper into the hold. The court held that such improper loading by plaintiff's fellow longshoremen did not create a condition of unseaworthiness chargeable to the defendant. In Sullivan v. United States, 203 F.S. 496 (S.D.N.Y. 1961), the plaintiff, a longshoreman working in the hold, was injured when three cartons of frozen beef fell from a pallet and struck him. The court found the accident to have been due to the "transitory or momentary negligence" of the winchmen, employees of the stevedore. The court held: "The fact that the winchmen of the respondent impleaded were guilty of operational negligence did not render the said vessel unseaworthy nor did such negligence create an 'unseaworthy condition.'" 203 F. S. at 503. In Harrel v. Lykes Bros. S.S. Co., 165 F. S. 125 (E.D. La. 1958), the plaintiff, a longshoreman, while working in the tweendeck, was struck by a hundred pound sack of corn which fell from a pallet brought over the hatch through the use of the vessel's equipment. The court found

the accident to be due either to negligent loading of the pallet or negligent manipulation of the draft by the longshoreman operating the winch. The court stated succinctly that:

"No court has as yet held that an improperly loaded pallet makes the vessel unseaworthy. This court does not do so now." (165 F. Supp. at 126). See also Phipps v. N. V. Nederlandsche Amerikaansche S. M., 259 F. 2d. 143 (9th Cir. 1958).

9. There remains to be considered the question of the applicability of the doctrine of instantaneous unseaworthiness, i.e., that, although the ship's equipment was seaworthy, nevertheless, in the few seconds that the improperly fastened draft was being raised, the ship was unfit and the unfitness during that period caused the injury. The law of unseaworthiness has not yet been so extended. Titus v. The Santorini, 258 F. 2d. 352, 354 (9th Cir. 1958); Grillea v. United States, 232 F. 2d. 919 (2d. Cir. 1956). In Morrel v. United States, supra, the plaintiff was injured when a lifeboat in which he had been working fell from its davits due to negligence of a fellow employee. The plaintiff contended: "that a seaworthy lifeboat may be made instantaneously unseaworthy by improper use of a seaworthy safety device by a fellow worker." (9th Cir., 297 F. 2d at 663). The Court held:

"As to the theory of instantaneous unseaworthiness we understand appellants to urge that a safe place to work in a perfectly seaworthy vessel, properly equipped with all safety devices (including a specific warning sign not to turn the lever which was turned by a fellow employee), became suddenly "instantaneously" unseaworthy when that lever was turned, and the boat started to fall; and that such

alleged unseaworthiness, and not the turning of the lever, was the proximated cause of the accident. We reject any such alleged distinction as to proximate cause." (9 Cir., 297 F. 2d. at 664).

To the same effect, Seitz v. M.V. the Captantonis, 203 F. S. 723 (D. Ore. 1962).

Conclusions of Law.

1. The defendant and third party plaintiff was not negligent.

2. The SS CIUDAD DE CUMANA was seaworthy.

3. The plaintiff's injury was caused solely by his own negligence and that of a fellow longshoreman.

4. The complaint and the third party complaint are to be dismissed.

The parties may, on or before ten days from the date hereof, submit additional proposed findings of fact and conclusions of law consistent herewith.

Settle an order, consistent herewith, on or before fifteen days from the date hereof.

End.

APPENDIX D

Opinion, on Prior Appeal, of United States Court of Appeals

U. S. Court of Appeals
Second Circuit

decided January 15, 1962
298 F. 2d 239

Marshall, Circuit Judge

Plaintiff appeals from a judgment entered in the Eastern District of New York dismissing his complaint after trial before a jury which failed to reach a verdict. The sole reason asserted by the judge below in support of his action was "that the plaintiff * * * failed to prove a prima facie case."

1. In reviewing a judgment granting a motion to dismiss after trial, it is axiomatic that the facts are to be viewed in the light most favorable to plaintiff. On February 24, 1955, plaintiff was a stevedore in the employ of John W. McGrath Corp., third-party defendant, and engaged in loading a vessel owned by C. A. Venezuelan Navigacion, defendant and third-party plaintiff. Plaintiff was injured when a pallet loaded with cargo fell while being raised by the ship's winch. The pallet was connected to the winch by means of a cable and a bridle. The bridle consisted of four wires meeting at the top but spreading downward in pyramidal fashion where each was attached to a corner of two metal bars. Two tongs were connected to each bar. When a pallet was to be lifted from the dock to the ship, the tongs were inserted into certain apertures or openings cut into the side of the pallet. Upon an appropriate signal, the winch would lift the pallet.

Appendix D

The evidence for plaintiff indicated that ofttimes the apertures in the pallets were not of the correct size, thus either causing, when too small, the longshoremen to "struggle" to get the tongs in or creating, when too big, a tendency for the tongs and the metal bars to slip completely out. On this occasion, the tongs were placed in the apertures, the signal given, and the pallet raised to eight or ten feet above the dock. At this point, the tongs and bar on plaintiff's side slipped completely out of the apertures, thus causing the cargo-laden pallet to fall on plaintiff. The defendant (third party plaintiff) and third-party defendant presented evidence indicating other explanations for the accident. The jury, of course, was free to accept whichever version it believed and to disregard the others. The District Judge, in ruling upon the motion to dismiss, however, had no such freedom but was bound to accept the evidence most favorable to plaintiff. The question before the judge was whether plaintiff had made out a prima facie case under the doctrine of unseaworthiness upon the testimony so viewed.

(2, 3) The doctrine of unseaworthiness imposes upon a ship owner an absolute duty to furnish a vessel and appurtenances thereto reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 C. Ct., 926, 4 L. Ed. 2d 941 (1960). The fact that the stevedoring firm may have supplied the defective appurtenances, here the pallet, does not absolve the vessel owner from liability under the doctrine. Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir., 1953), aff'd per curiam 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954); Reed v. The Yaka, 183 F. S. 69 (E. D. Pa. 1960). Nor is the fact that the injury occurred on shore a bar to recovery so long as the requisite maritime "status" or "relation" is present. Strika v.

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Netherlands Ministry of Traffic, 185 F. 2d 555 (2 Cir., 1950), cert. denied 341 U. S. 904, 71 S. Ct. 614, 95 L. Ed. 1343 (1951), Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. S. 812 (E. D. Pa. 1959).

4. In the light of these precedents, we have little choice but to reverse and remand for a new trial. From plaintiff's evidence, the jury could have found the pallet was being put to its intended use, the apertures in the pallet were not reasonably fit for that use, and the defects in the pallet caused plaintiff's injuries. From this it might have concluded the ship was unseaworthy and plaintiff should have recovery. We must, therefore, reverse and remand for a new trial. The dismissal of the third party complaint must also be reversed and remanded.

Reversed and Remanded.

MOTION FILED

SEP 30 1964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 447

NICOLA MASSA,

Petitioner,

against

Ca. VENEZUELAN NAVIGACION,

Respondent.

MOTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

NICOLA MASSA,
Petitioner.
against
CA. VENEZUELAN NAVIGACION,
Respondent.

MOTION BY JOHN W. McGRATH CORPORATION FOR LEAVE TO FILE A BRIEF IN OPPOSITION TO THE INSTANT PETITION FOR CERTIORARI AND TO OTHERWISE PARTICIPATE FULLY HEREIN AND FOR AN AMENDMENT OF THE CAPTION OF THE INSTANT PETITION FOR CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

John W. McGrath Corporation, the movant herein, was impleaded as a third-party defendant by the defendant C. A. Venezuelan Navigacion (respondent herein) pursuant to Rule 14(a), F. R. C. P. Subsequently, the third party defendant, John W. McGrath Corporation, served both an answer to the third-party complaint and to the complaint of the plaintiff.

At all times thereafter the third party defendant, John W. McGrath Corporation, comported itself as a party ad-

verse to the Petitioner herein. The interests of the said third-party defendant, John W. McGrath Corporation, would be adversely affected were the instant petition to be granted.

Movant, John W. McGrath Corporation, has no knowledge as to why its name was omitted from the caption of the Petition herein.

Accordingly the third party defendant, John W. McGrath Corporation, moves this Court for leave to file the annexed brief and appendix in opposition to the Petition, for leave to participate herein to the same extent as if named as a respondent herein, and for an amendment of the caption of the Petition so as to include the third-party defendant as a respondent herein.

Respectfully submitted.

James M. Leonard,
Counsel for John W. McGrath Corporation.
70 Pine Street,
New York, New York 10005

New York, New York
September 29, 1964.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

NICOLA MASSA,
Petitioner,
against
C.A. VENEZUELAN NAVIGACION,
and
JOHN W. McGRATH CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

Statement

The Petitioner herein, Nicola Massa, sustained injuries on February 24, 1955 while in the employ of John W. McGrath Corporation. McGrath, a stevedoring concern, had employed Massa as a longshoreman to work in connection with the loading of the S.S. CURAÇAO DE CUMANA (10a).*

There were two trials of this action. Upon the first trial the Petitioner's attorney restricted his claim to a single specification, one of unseaworthiness, viz. the claim

* Numeral references followed by the letter "a" are to pages in Petitioner's Appendix.

that the pallet upon which certain cartons of lube oil had been loaded was defective in that the slots or holes or apertures for the pallet bar plugs were too large (9a).

Upon the second trial, it was contended by the Petitioner's attorney that the pallet was unseaworthy because the wood comprising it was rotten, defective and broken and that the nails holding the pallet together were missing. These claimed defects, it was asserted by Petitioner's counsel, caused the pallet to come loose while it was being raised, thus precipitating some of the cargo on to the Petitioner, causing him injury (2 M. A., 3 M. A.).*

The second trial was tried to the court alone, a jury having been waived by counsel for Petitioner (9a). Subsequent to the trial the trial court made specific findings of fact (10a-13a). It was held by the trial court that the pallet in question was proper, safe, undamaged and in all respects seaworthy (13a). The trial court further found, based upon the testimony of supervisory employees of McGrath, that the cause of the accident was an improper insertion by Massa and a co-worker of the pallet plugs in the wrong pallet on one side of the operation (13a).

Upon the first trial the plaintiff relied on three fact witnesses to support his contentions. These were Nicola Massa (the Petitioner herein), Louis DiMeo and Frank Marrocolla. Testimony by all three on the first trial was vague in the extreme. The plaintiff himself gave no testimony with respect to any specific defective condition of the particular pallet in question. The only thing which the plaintiff said upon the first trial (and duly quoted in the petition at the top of page 5) was "Sometimes the hole is no good and then they slip out." Upon the second trial plaintiff did not testify and it was stipulated that if called he would testify as he had upon the first trial (Petition p. 3).

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* Numerical references followed by the letters "M. A." are to pages in McGrath's Appendix.

Louis DiMeo testified upon the second trial but his testimony contained nothing which could serve as the basis for a finding that the pallet in question was defective (1 M. A.-2 M. A.). The last of Petitioner's witnesses, Frank Marrocolla, however, testified that he observed the pallet to be rotten, defective, broken with loose boards and missing nails and in general in such a complete state of disrepair as to tax belief (2 M. A.-3 M. A.).

The testimony given by him upon the second trial was at complete variance with that which he gave upon the first trial (4a).

The findings of the trial court rejected the testimony of Frank Marrocolla and accepted the testimony of the supervisory employees of McGrath who examined the entire scene of the accident including the pallet in question.

The scene, as observed by the witnesses to which the trial court did give credit, showed the pallet plugs inserted into the top pallet of the group on one side, whereas the pallet plugs on the other side were inserted in the next to top pallet (6 M. A., 7 M. A., 11 M. A.). A portion of the cargo still remained loaded on the top pallet (7 M. A.). The cargo rigging was observed by McGrath's supervisory employees to be still draped over the top pallet (12 M. A.). In all, the testimony of the defense witnesses established conclusively that the top pallet was the pallet involved in the accident and that it was in proper, safe and seaworthy condition (10 M. A., 16 M. A.).

The findings of the trial court were thus based upon substantial, nay, incontrovertible, evidence.

POINT I

The contention of Petitioner that trial court was hoodwinked and that the trial court was bound to disregard the actual facts because of a supposed stipulation is nothing but "vain imaginings".

The argument adduced by Petitioner's counsel ignores the entire bulk of testimony which conclusively demonstrated that the top pallet as observed by McGrath's supervisory employees was the pallet in question and was in proper condition. Petitioner's argument runs:

A. The defense was bound by stipulation to the fact of there being four pallets originally at the scene of the accident.

B. The trial court should have been bound to the same stipulation.

C. The witnesses for the defense testified that the top pallet observed by them was one of a group of three pallets.

D. Ergo, the pallet observed by the defense witnesses was not the pallet involved in the accident.

Petitioner thus adopts the attitude that the Trial Court should have rejected all of the evidence which led it to accept the testimony of defense witnesses as credible, should have disregarded the factual contentions inexorably flowing from the unrebutted testimony of those defense witnesses, should have ignored the blatant self-contradictions, implausibilities and discrepancies of plaintiff's "star" witness, should have adopted a version of the accident completely inconsistent with the conceded physical facts, all for the sake of the ominous claimed inference purportedly raised by Petitioner's contention that a stipulation at a subsequent trial includes a stipulation at a former trial.

Petitioner contends that, upon the first trial, a stipulation was entered into with regard to various matters, including (avers Petitioner) the datum that there was a total of four pallets. The language of the colloquy assertedly constituting the "stipulation" of the first trial is set forth on page 11 of the petition. While it is open to sharp question whether the parties there reflected an intent to stipulate that there were, indeed, four pallets, the decision of the Court of Appeals prescinds from that question entirely.

A plain reading of the true stipulation entered into upon the *second* trial (set forth on page 3 of the petition) demonstrates that the parties entered into an agreement with respect to the prior testimony of Nicola Massa and the testimony of Nicola Massa alone.

> "... and that in lieu thereof we will offer in evidence the entire transcript of his testimony on the prior trial to be considered with the same force and effect *as if he had so testified in court on this trial.*" (emphasis supplied)

No one stipulated with respect to any testimony by Nicola Massa's *attorney*.

No one stipulated with respect to any claimed previous "stipulations" in the record of the first trial.

Later in the second trial, *after* the plaintiff's "star witness", Marrocolla had been confronted with the shattering contradictions between his testimony on the first and on the second trial, *after* the plaintiff had rested, and during the examination of a *defense* witness, Petitioner's counsel began to expound the theory that there was a phantom missing pallet.

When Petitioner's counsel began to voice objections based on the notion that it had been stipulated that there were four pallets and that the defense's witnesses were speaking of the top pallet of a pile of *three*, the trial court

specifically and unequivocally stated that there was no such agreement as to the numerical identity of the pallet involved in the accident.

> "Q. Now, this pallet that you reloaded with cartons, did you or did you not physically examine that pallet before it was reloaded with cargo?
> A. Yes, sir.
> Q. Tell us what parts of it you loaded——
> Mr. Rassner: Objected to as immaterial.
> The Court: Read that.
> (Record read)
> Mr. Rassner: We are making no claim that there was anything wrong with the third pallet. We do concede that the third pallet was used to reload and bring it up, and that it was good.
> The Court: No, you see what——
> Mr. Rassner: Objection withdrawn. We will use that in the argument.
> Mr. Giallorenzi: I don't understand these objections and long speeches and then they are withdrawn.
> The Court: You understand that if you had not withdrawn it, I was going to overrule it, and I want you to understand why.
> "You gentlemen don't agree on which was the $64,000 question pallet." (9 M. A.)

What is more, the Petitioner's attorney himself conceded the accuracy of the Court's statement:

> "Mr. Rassner: Right". (9 M. A.)

The Court of Appeals succinctly characterized this entire line of argument as "vain imaginings" (3a).

What Petitioner actually seeks herein is yet a third review of the facts. Such is not a function of a petition for certiorari.

As Mr. Chief Justice Hughes said:

> "Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, prin-

ciples of law not being in controversy. It is only when the facts are interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.

"This at once disposes of a vast number of factual controversies where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves."

Printed in SRep No. 711, 75th Congr., 1st Sess 40. Quoted by Mr. Justice Frankfurter in his dissenting opinion in *Dick* vs. *N. Y. Life Ins. Co.*, (q.v.) 359 U. S. 437, 447-463 at p. 455.

When, in an action at law, as here, a jury has been waived, an appellate court may not substitute its assessment of the facts for that of the trial court.

McCaughn v. *Real Estate Land Title and Trust Company et al.*, 297 U. S. 606.

The factual findings of the trial court are not subject to reversal on appeal unless "clearly erroneous".

Fed. Rules Civil Proc. § 52(a)
United States v. *Oregon State Medical Society*, 343 U. S. 326;
McAllister v. *U. S.*, 348 U. S. 19;
Guzman v. *Pichirilo*, 369 U. S. 698.

Far from being "clearly erroneous", the findings of the trial court were based on such substantial evidence that Petitioner's assertions as to the facts were dismissed as implausible and unworthy of belief.

POINT II

The affirmance by the Court of Appeals of the findings and conclusions of the District Court herein does not involve any conflict with prior decisions of this Court, or with decisions of other circuits, or with other decisions of the Second Circuit.

It is urged by Petitioner that the affirmance by the Court of Appeals for the Second Circuit herein brings that Court into conflict with prior decisions of this Court (Petition—Point I), into conflict with decisions of other circuits (Petition—Point II) and with previous decisions of the Court of Appeals for the Second Circuit (Petition—Point III).

McGrath submits that an analysis of the basis for the holding of the Second Circuit herein demonstrates no conflict with this Court, with other circuits or with prior holdings of the Second Circuit.

Upon the first trial of this matter, Petitioner's counsel specifically limited his claim to an assertion that the pallet in question was unseaworthy because of a claimed defective aperture.

Though, on the second trial, Petitioner enlarged the defects claimed with respect to the pallet the issues then litigated were limited to the pallet and the pallet only (9a).

At no time on either trial, did the Petitioner claim that the *method* of loading was improper (9a).

At no time was it suggested that the *method* employed during the operation in question was anything but within the strict mandates of safe, sound and prudent stevedoring technique.

At no time did the trial court find that the *method* of loading was improper or dangerous.

The explicit posture of this action at all stages, was that the method of loading was proper, customary and safe.

The trial court found that the cause of the accident was a *single, isolated, negligent act* by Petitioner and a co worker while engaged in a concededly proper *method* of loading (13a).

Had Massa, the Petitioner herein, inserted the plugs of the pallet bar he was handling into the proper slots there would have been no accident (13a).

Petitioner cites the decision of this Court in *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 as being somehow in conflict with the result reached in the case at bar.

In *Gutierrez* the cargo bag there involved was ripped and torn, thus scattering beans dangerously about the work surface. This Court held that the *bean bag* was unfit and unseaworthy, hence liability was imposed on the shipowner.

> "Beans belong inside their containers, and anyone should know, as the trial court found, that serious injury may result if they get out of their containers and get underfoot. These bean bags were unfit and thus unseaworthy." (373 U. S. 206, 214)

In the case at bar all of the physical instrumentalities involved were found to be fit and proper to fulfill their intended function. McGrath submits there can be no meaningful relationship between the *Gutierrez* decision (which involved the classical defective condition peculiar to the unseaworthiness concept) and the instant case (which involved a single, isolated negligent act).

Again, Petitioner suggests that the decision of the Second Circuit in the instant case is in conflict with the deci

sions of the Third Circuit in *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar Steamship Corp.* 331 F. 2d 657. We do not feel that it is here necessary to discuss the correctness of these two decisions of the Third Circuit, (though the disposition by this Court of the petitions for certiorari in *Puddu* v. *Royal Netherlands S. S. Co.*, 2 Cir., 1962, 303 F. 2d 752 cert. denied 371 U. S. 840; and *Spinelli* v. *Isthmian S. S. Corp.*, 2 Cir., 326 F. 2d 870; petition for certiorari denied May 18, 1964, U. S. 12 L ed. 2d 298, rehearing denied June 26, 1964 U. S. 12 L ed. 2d 1058, would suggest that the rule adopted by the Second Circuit to the effect that a negligent method of operation is not to be equated with unseaworthiness is the correct one):

Presciding from that question entirely, McGrath submits that the facts of the instant case are clearly distinguishable from the factual structures underlying the *Ferrante* and *Thompson* cases.

Both *Ferrante* and *Thompson* imposed liability for unseaworthiness on a shipowner whose stevedore had undertaken a dangerous and negligent *method* of operation. Neither decision affected to deal with the occurrence of a single, spontaneous, isolated act of negligence in the midst of a method of operation which was safe and proper.

Thus, in *Ferrante*, it was the dangerous procedure of making two piles of plywood boards in a single slingload which caused the draft to fall. The Court castigated the "method of assembling two piles of plywood boards" side by side to make a slingload.

In *Thompson*, in spite of the availability of alternative methods of procedure the longshoremen elected to move a loaded freight car by battering it with three other cars. The Third Circuit held "that the method used to load the ship's cargo created an undue risk to those called upon to load it, making the vessel unseaworthy, and that the unseaworthiness was the cause of Thompson's injury." In arriving

at this conclusion the Third Circuit alluded to the dictum of this Court in *Morales* v. *City of Galveston*, 370 U. S. 165, 170 wherein it was said that unseaworthiness might "'arise'' from "The method of loading her cargo . . ."

Ferrante and *Thompson* and the cases cited therein share a common denominator. A continuous *method* of stevedoring operation was in existence which method was dangerous and unsafe.

In the instant case the *method* was concededly *proper*. The single act of negligence which caused the accident was the result of an improper execution of a proper and safe method. No decision has extended the law of unseaworthiness that far.

That a negligent act may create a subsisting condition which is unseaworthy, is of course, obvious; that is not at all the same thing as saying that the negligent act *is* the unseaworthiness. Thus, Petitioner's reference to *Gridlea* v. *U. S.*, 2 Cir., 232 F. 2d 919 is not in point. In *Gridlea* it was a subsisting dangerous condition and not an instantaneous act which was condemned.

Thus Petitioner has demonstrated no disharmony between the Circuits, or otherwise, relevant to the facts in this case. The instant Petition represents merely a last gasp effort to retrieve a case lost on the facts. The Supreme Court of the United States is an inappropriate forum for the attempt.

> "The question how the Court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit

Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Co. v. *Coty*, 262 U. S. 159, 163

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted.

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APPENDIX

OF

JOHN W. McGRATH
CORPORATION

[96]* LOUIS DI MEO, called as a witness, having been first duly sworn, was examined as follows:

[220] *Re-direct examination by Mr. Rassner:*

[229] The Court: There is nothing in this record as to dimensions of any one pallet being any different from any other pallet.

Mr. Rassner: Well, I want to ask a question. Was this pallet any different than any of the other pallets you used?

The Court: How would he know?

Mr. Rassner: By looking at it.

The Court: Did you ever measure——

Mr. Rassner: I don't mean the size. I mean the physical condition, state of repair.

Mr. McKernan: I respectfully submit this is improper direct examination. There is not anything to that.

The Court: I don't think it is correct. You can call somebody on direct examination to testify as to condition, but you never went into this at all.

[234] The Court: Was there anything about this particular pallet that was different from any other pallet?

The Witness: I think it was in the holes, your Honor. These holes that's cut out where you put the prongs in.

[236] Mr. Rassner: If your Honor please, we appreciate the fact that you have exercised your Honor's discretion in permitting me to go back to direct testimony.

I have had a conference with associate counsel, and we have decided not to take advantage of your Honor's decision in our favor and to stop proceeding any further as to redirect.

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* Numerical references in brackets are to pages in the Transcript of Trial Testimony.

The Court: In other words, as to any questions of this witness concerning his opinion as to the state of repair of the pallet, is that right?

Mr. Rassner: Yes, sir.

* * *

[239] FRANK MARROCOLLA, called as a witness, having been first duly sworn, was examined and testified as follows:

* * *

Direct examination by Mr. Rassner:

* * *

[253] Q. Now, what about the wood in which the prongs had been inserted? A. The wood just turned a little bit, gave a little angle [254] (indicating) because the wood underneath wasn't nailed.

* * *

[266] Q. What happened to the pallet that had fallen? A. Repeat that?

Q. What happened to the pallet that had fallen? A. We put it on the side.

Q. Describe that pallet to his Honor after it had fallen. A. Well, after we sent this draft up, after we hooked up this draft, I went over and checked to see what was wrong with it.

The Court: Did you look at it?

The Witness: Yes, your Honor.

The Court: So, you examined, or you looked, at least, you looked?

The Witness: Yes.

The Court: At the pallet?

The Witness: Yes.

The Court: All right, what did you see?

[267] The Witness: I seen the holes. The wood on the side that the prongs on Nick Massa's side

was rotten and there was no nails underneath. The boards was loose underneath.

The Court: The wood was rotten, you say?

The Witness: Yes.

The Court: On the plaintiff's side?

The Witness: Yes.

The Court: How about the other side?

The Witness: It was fairly good.

The Court: Fairly good on the other side?

The Witness: Yes, sir.

The Court: What else?

What had no nails?

The Witness: The boards on the side of the board—the board underneath didn't have no nails.

The Court: Which boards had no nails?

The Witness: The boards underneath the pallet.

The Court: Underneath the pallet?

The Witness: Yes.

* * *

[272] Q. Can you describe the extent to which these boards on the pallet were rotten?

Describe it.

How far were they rotten? How much of an area was rotten? A. Well, as I said before, they were—there was no nails underneath the bottom and the holes were——

The Court: What about the side pieces?

[273] The Witness: They were rotten and underneath too, there was no nails on the boards underneath.

* * * *

[294] *Cross-examination by Mr. Giallorenzi:*

* * *

[306] Mr. Leonard: Your Honor, that has to be explained. There was a key question that has

not been called to the Court's attention which bears on whether or not the condition that this man has testified to actually existed. That is a question on page 92 of the record, direct examination by Mr. Rassner.

The Court: Of this witness?

Mr. Leonard: Yes, Frank Marrocolla, line 25, just after he had been asked whether or not he heard the testimony of Messrs. Massa and Di Meo, and he said that he had, and he was asked this question:

"Q. Is there any additional fact you know about or any different fact that you know about?"

And that answer was given: "A. No, sir."

[307] The Court: Well, of course, you haven't gone back far enough.

Start with line No. 10 and read down to line No. 25, because, I assume, you gentlemen are going to agree now that these questions at page 92 in the prior trial were asked from line 10 to line 3 of page 93?

Mr. Leonard: Starting at line 10, question by Mr. Rassner:

"Q. Mr. Marrocolla, were you one of the longshoremen working with Massa when he was injured?

"A. I was.

"Q. On February 24, 1955?

"A. Yes, sir.

"Q. Did you see him get hurt?

"A. Yes, sir.

"Q. Were you here throughout the entire testimony when Mr. Massa was on the witness stand?

"A. Yes, sir.

"Q. Were you here throughout the entire testimony of the previous witnesses?

"A. Yes, sir."

[308] The Court: Now, let us see who they were. Di Meo?

Mr. Leonard: And Massa.

The Court: And Massa.

Mr. Rassner: Those were the only two.

The Court: Go ahead.

Mr. Leonard: "Q. Could you hear everything they said?

"A. Yes, sir.

"Q. Is there any additional fact that you know about or any different fact that you know about?

"A. No, sir."

The Court: All right.

* * *

[310] The Court: No. That's quite all right. Now, is it a fact that the prior witnesses whom this man had heard had said nothing about a rotten pallet?

Mr. Rassner: We didn't go into that subject.

The Court: They had said nothing——

Mr. Rassner: The answer is yes to your Honor's question.

* * *

[489] JACQUES WAGEMAKER, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. McKernan:

[492] Q. Do you know what time the accident happened? A. I think it was around ten-thirty at night.

Q. How long after that did you get to the scene of the accident? A. I would say a very few minutes after.

Q. What did you see when you first got there? A. I saw a group of men standing about in a circle, and I went through the circle and noticed that Mr. Massa was laying

on the floor of the pier, and was already attended to by Mr. Lucas who was the terminal superintendent.

The Court: You said the floor of the pier. Do you mean lying on top of any pallets?

The Witness: No, sir. I meant to say that he was not on a skid.

The Court: All right. He was on the floor?

[493] The Witness: Yes.

The Court: Was he lying on his back or on his side, if you remember?

The Witness: I don't remember.

The Court: All right.

Q. Now, what else did you see? A. I asked Mr. Lucas whether Mr. Massa was attended to, and he said yes.

I then proceeded to the scene of the accident, which was at the skid of No. 4 hatch, after end.

I noticed cargo consisting of cartons, oil, in cans, strewn about in a rather disorderly manner.

Q. After you noticed the disorderly manner, did you come closer to the cargo? A. Yes, sir, I did.

I then noticed the particular pile of the pallet, the platform of the pallet that was in this disarray.

Upon closer investigation of it I noticed that the bar of the—the spreader bar with the tongs facing the forward end of the ship was in place in the top pallet; in other words, the tongs were inserted into the plugs of the top pallet. I walked around——

* * *

[495] Q. Describe the pallet that you saw. A. As I said before, it was a pile of pallets in disarray which the two top pallets were in disarray. The pallet facing the bar with tongs, and facing the forward end of the ship was inserted in the top pallet, and the [496] second bar facing the after end of the ship was inserted in the second pallet.

Mr. Rassner: I ask that the answer be stricken as not relating to the pallet in question.

The Court: We don't know yet what pallet it was.

I take his testimony to be that he saw a pallet?

Mr. Rassner: Yes.

The Court: That had the prongs inserted in the forward end, and I don't remember now what he said about the after end of it, the bar on the aft side or aft end, rather, where was that?

The Witness: The bar facing the after end of the ship was inserted in the second pallet, partially inserted, I should say.

Q. Did you see any pallet with any cargo on it at that time? A. The top pallet had some cargo on. A few cartons.

The Court: I don't quite get the picture yet: [497] These two pallets that you have referred to was one on top of the other?

The Witness: Yes, your Honor.

The Court: Did the sides line up with one another?

The Witness: No, your Honor.

The Court: They did not?

The Witness: No.

The Court: Did the top one overhang upon the pallet below it?

The Witness: They were kind of (indicating).

The Court: Criss-crossed?

The Witness: What we call cater-corner.

* * *

[504] Q. Just tell us what you did when you had the pallets hoisted up and down again. Tell us what you did and what happened. A. I got a couple of the men together and when the pile was straightened out, I had the pallet

which was hanging in the air lowered down on top of this pile and the bars with the plugs taken out.

And the whole bridle was thereupon hoisted in the air while it was clear above the men's heads. The few men that I got together thereupon proceeded to get these cartons of oil together and place them in an orderly fashion on the pallet ready to be hoisted into the ship.

The Court: That's the top one?

The Witness: The top one, your Honor. When that was done to my satisfaction, the bridle was lowered.

The bars with the plugs were reinserted in the top, in the proper place, and the draft was then taken away and loaded into the ship.

[505] Q. Well, where did the cargo come from that was loaded on this draft, this pallet? A. It was picked up again from what was laying on the dock.

Q. Now, outside of this pallet that was reloaded with the other pallets underneath it, was there any other pallet there at that location on the stringpiece? A. Not to my knowledge.

Q. Well, would you have seen it if there was?

Mr. Rassner: That's objected to.

A. I would have seen it, yes.

[508] Q. What efforts did you make, if any, to see or ascertain for yourself what was on the stringpiece? A. I walked around the pile. I looked over, carefully, where the cartons of oil are located; and in doing so, I did not find any other pallet in the neighborhood other than those that were visible on the pile underneath the hammer.

The Court: When you say the neighborhood, we know what a stringpiece is, but what is a neighborhood on a pier?

The Witness: I would say close to the working area, your Honor.

The Court: Do you mean by that over the entire stringpiece?

The Witness: That's right, that's exactly right. That would be six hundred feet long.

The Court: You looked over an area which you called a neighborhood of what dimensions?

The Witness: About twenty-five, thirty feet (indicating).

Q. Now, this pallet that you reloaded with cartons, did you or did you not physically examine that pallet be- [509] fore it was reloaded with cargo? A. Yes, sir.

Q. Tell us what parts of it you loaded——

Mr. Rassner: Objected to as immaterial.

The Court: Read that.

(Record read.)

Mr. Rassner: We are making no claim that there was anything wrong with the third pallet. We do concede that the third pallet was used to reload and bring it up, and that it was good.

The Court: No. You see what——

Mr. Rassner: Objection withdrawn. We will use that in the argument.

Mr. Giallorenzi: I don't understand these objections and long speeches and then they are withdrawn.

The Court: You understand that if you had not withdrawn it, I was going to overrule it, and I want you to understand why.

You gentlemen don't agree on which was the $64,000 question pallet.

Mr. Rassner: Right.

[511] The Court: You concede that that is the pallet, good in all respects, that was the pallet heretofore described by you as the rotten pallet?

Mr. Rassner: No, no, but I mean there is no point in describing this particular pallet.

The Court: But he says that this is it.

Mr. Rassner: All right.

If this were it, it was perfectly good. There was nothing wrong with it. If this was the pallet——

The Court: In other words, you are saying that the pallent that raised some of this cargo that was in disarray on the deck after the accident was in good condition?

Mr. Rassner: Of course.

* * * *

[514] The Court: Before it was reloaded?

The Witness: Yes, your Honor.

The Court: What was the extent of your look?

The Witness: That it was a perfectly good pallet.

The Court: No, no. What was the extent of your look?

How did you look at it?

The Witness: I walked around it.

The Court: All the way around it?

The Witness: Yes, sir.

The Court: What did you look at? What part of that pallet did you look at as you walked all the way around it?

The Witness: The top markings, since I cannot see the bottom, but the top marking or whether the notches were excessively large or excessively small.

The Court: Did you look to see what kind of wood it was, healthy looking wood, or rotten [515] wood?

The Witness: The wood was in A-1 shape, good shape.

* * *

[529] *Cross-examination by Mr. Giallorenzi:*

* * *

[531] By that, I mean, what was the position of the bridle and the tongs and the pallet bar and everything else you saw? A. The bridle was lowered, in a lowered position on the top pallet.

I also noticed that there was some cargo, as I stated before, on the top pallet, some few cartons.

The pile of pallet was in a disarray, and the top pallet facing in the forward end of the ship, that bar was fully inserted in the notches.

The bar facing the after end of the ship was partially inserted in the second pallet. The second pallet from the top.

Q. That was the very first thing that you saw when you reached the scene of the accident? A. Yes, after I left Mr. Massa.

The Court: Was there slack in the bridle?

The Witness: The bridle was completely lowered on top of the pallet.

Mr. McKernan: "On top of" what?

The Witness: On top of the pallet.

Mr. McKernan: On top of the cargo?

[532] The Court: On top of the pallet. The spreader then was down?

The Witness: Yes.

The Court: Down on the top pallet?

The Witness: Yes.

Mr. Giallorenzi: You just asked the question that I was going to ask.

The Court: I am sorry.

Mr. Giallorenzi: Thank you very much.

Q. Now, immediately below the spreader we see in this Exhibit No. 4 a number of, oh, I would say—well, would

you describe what we see, Mr. Wagemaker, from that? A. A number of ropes spliced into a net.

Q. What is the purpose of the ropes and the net? A. To hold the cargo in place while the draft is being hoisted or lowered.

Q. When you got to the scene of the accident and you saw the spreader on the top pallet with the cargo, did you also see those ropes? A. Yes, they were kind of draped (indicating). Over the pallet (indicating).

Q. Can you tell us how many cartons of case oil you saw on the uppermost pallet at the time that you first [533] arrived at the scene of the accident? A. I would say around, about a dozen.

Q. Can you tell us how many cartons of case oil were on the skid or the dock itself when you first arrived at the scene of the accident? A. After the draft was put together, put together again on the top pallet, I counted, if I am not mistaken, thirty-six cartons; therefore, there should have been laying about twenty-four cartons on the pier, partly on the skid.

Q. What was the purpose of counting these cartons? A. To ascertain what the weight of the draft was.

Q. Did any of these cartons fall into the water? A. No, sir.

[537] Q. Did any one of those men, Di Meo, Gambardella, or Marrocolla request a gear man? A. No, sir.

* * *

Cross-examination by Mr. Rassner:

[604] Q. Now, you didn't see the pallet fall, did you? A. No, sir.

Q. And when you got there, the pallet that you saw was the third one on other pallets, is that right? A. The third one on top of other pallets?

Q. There were two pallets, and the one that you saw was the third one? A. Yes.

Q. And that one was loaded with cargo when you got there? A. Yes, and the gear was resting on top of it.

[605] Q. The gear was on the bottom? A. No, on top of the pallet with the cargo, on top of it.

Q. Where, with relation to the top pallet, where were the bars, the two bars, the bridle? A. The bars facing the forward end of the ship was fully inserted at the top pallet.

The second bar facing the after end of the ship was partly inserted into the second pallet.

Q. Where was the bridle? A. The bridle was laying on top of the top pallet.

The Court: We know what a bridle is, it has been demonstrated before.

* * * *

[612] GEORGE JOHN PAUL LUCAS, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. McKernan:

[612] Q. Now, at the time of the accident, by whom were you employed? A. By the John W. McGrath Stevedoring Corporation.

Q. In what capacity? A. As terminal superintendent, piers 9, 10 and 11 on the North River.

Q. On the night in question, was your attention called [613] to an accident where Nicola Massa was injured? A. It was, sir.

Q. Did you go to see Massa? A. Yes, sir.

Q. About how far away were you on the pier from where this accident occurred at the time that you were advised? A. Approximately two hundred feet away.

Q. Did you go immediately to the scene of the accident? A. I did.

Q. You went to the scene of the accident.

George John Paul Lucas—Direct

Will you tell us what you saw there? A. I arrived at the scene of the accident. There were numerous amounts of longshoremen around. I went to Mr. Massa who was laying on the deck of the pier floor, immediately investigated his condition. Immediately covered him up, as the temperature was twenty degrees, and the wind blowing through the door and discovered that his leg was injured.

Q. This is inside the pier? A. Yes.

The Court: Now, he said that he was two [614] hundred feet from the scene of the accident?

Mr. McKernan: Yes.

The Court: And he went there immediately?

Mr. McKernan: Yes.

Q. Now, did you hear anything to suggest that there had been an accident, or, how did you learn that there was an accident? A. The minute that the accident happened, a longshoreman usually runs right to the head of the pier to call for an ambulance. This man informed me that there was an accident in No. 4 hatch——

The Court: I see.

The Witness: I arrived at the scene——

The Court: I see.

Plaintiff is on the deck of the pier?

The Witness: Yes, and we covered him up.

Q. Inside the pier? A. Inside the pier, approximately ten or twelve feet inside the door.

We then discovered that injury to his leg. At that time, I would say, five minutes later or so, a police car arrived with two officers to investigate the same acci- [615] dent, of Mr. Massa, which is the custom in the port that a police car will arrive, and they informed us that an ambulance was on the way.

We then took Mr. Massa with a hi-lo and pallet, placed him at it, and brought him up to the office.

Q. Do you recall who put him on the pallet? A. The longshoremen in the area.

We all assisted in picking him up as carefully as possible, and he arrived at the office.

* * *

[640] Q. Did you see any other pallet on the stringpiece except those three that you mentioned? A. No, sir.

The Court: Did you look around that area?

The Witness: If it had been there, I would have tripped over it.

The Court: The question was, did you look around?

The Witness: Yes, I did.

The Court: Was there a pallet resting up against the three pallets that you saw in an angle such as I am demonstrating by this piece of paper (indicating)?

The Witness: No, sir.

The Court: With one end resting on the pier and maybe a portion of the pallet resting against these three pallets, and the other end up in the air (indicating)?

The Witness: No.

The Court: Was there a pallet, a single pallet, laying on the pier in the area of the three pallets that you have told me about?

[641] The Witness: No, sir.

* * *

[644] Q. Did any of the longshoremen request that you remove any pallet, bring it to the hospital pile?

Mr. Rassner: Objected to as immaterial.

[645] The Court: I will allow it as having some possible bearing on the contention that the fallen pallet which has been so often described as

the rotten pallet, was not fit for use and made the place a dangerous place to work, and I will take it.

A. No, sir.

Q. When you first went to the stringpiece, you testified you noticed a pallet with certain cans of cartons of oil on it, is that correct? A. That's right.

Q. Did you examine the uppermost pallet, or the pallet on which the cans were resting? A. Did I personally examine the pallet?

Q. Yes. A. I glanced over the pallet after discussion with Captain Wagemaker.

Q. What did you observe about the uppermost pallet?

• • •

[646] A. There was nothing wrong with the pallet.

Mr. Rassner: Now, I object to that.

The Court: That's a conclusion.

Q. What was the condition of the pallet you say you glanced at, the uppermost pallet with the cartons on it?

Mr. Rassner: I object to the form.

The Court: "The condition" no, I will allow that.

A. This pallet contained cartons of oil.

Q. We know that. I want to know about the condition of the pallet? A. The pallet was as normal as any other pallet, the two pallets below it, or any pallet on the pier, and orders were given to reload the pallet.

There was nothing wrong with it. The decking was in fine shape. There was nothing wrong with the cargo stowed on it.

Q. How were the crosspieces? A. Nothing wrong with it.

Q. Did you see the one at the forward end and also the one at the aft end? A. Yes.

• • •

[65] WILLIAM F. WHEELER, called as a witness, having been first duly sworn, was examined, and testified as follows:

Direct examination by Mr. McKernan:

Q. Are you in business for yourself? A. Yes.

Q. What is the nature of that business? A. I am engaged in a marine consulting firm here in the Port of New York.

Q. What is the name of that firm? A. Byrne, Wheeler and Company.

Q. What qualifications have you for being—

Mr. Rassner: I concede the witness' qualifications.

The Court: Do you want the concession?

Mr. McKernan: I will accept it, yes.

The Court: All right.

• • •

[66] Q. Now, I show you plaintiff's Exhibit 8, plaintiff's Exhibit 5, which are two photographs, and ask you to assume that a pallet, similar to the pallet shown in the photographs was loaded with approximately 2,000 pounds of cargo, consisting of oil in cartons, and the pallet [66½] commenced to be raised with its cargo.

I ask you to tell me whether or not you have an opinion as to whether the plugs or tongs in that pallet, could come out?

The Court: You are not asking him to assume that the plugs were ever in, in your hypothetical question.

Mr. McKernan: Thank you, your Honor.

Q. Also assume, that the plugs were in as far as they could go in the pallets, and then I ask you whether or not, while the elevation of the cargo is taking place, whether

or not those plugs could come out on any of them? A. I have such an opinion, sir.

Q. Will you state it? A. Assuming that the pallet bars were properly and correctly inserted into the pallet, and that the load on the pallet was within the capacity of the winch lifting it, once the load and the pallet was suspended on the wire; the pallet bars could not become disengaged, barring of course, a catastrophic force, such as being struck by lightning or some other such force, but it would be practically impossible to disengage the bars from the pallet while the load was suspended.

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 447

NICOLA MASSA,

Petitioner,

—against—

Ca. VENEZUELAN NAVIGACION,

Respondent.

BRIEF OPPOSING CERTIORARI

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Statement

Petitioner, a longshoreman employed by the Respondent, John W. McGrath Corporation, instituted this action to recover damages for injuries which he claims he sustained as a result of being struck by cargo which fell from a pallet during the loading of the S.S. "Ciudad de Cumana", a vessel owned by the Respondent, Ca. Venezuelan Navigacion.

Counsel for the Petitioner advised the Trial Court that the action was to be tried on the *sole* theory that the accident which Petitioner met with, was due to the use of a defective pallet which had been furnished by the Respondent, John W. McGrath Corporation, to load the vessel and accordingly the vessel was thereby rendered unseaworthy.

It was stipulated by counsel for all parties that the pallet which was being used at the time Petitioner met

with his accident had been loaded and brought to the vessel's side by longshoremen employed and controlled by the Respondent, John W. McGrath Corporation, and that the pallet together with the bridle and gear used in connection therewith were owned by the Respondent, John W. McGrath Corporation. Counsel for the Respondent, John W. McGrath Corporation, further stipulated that it was his client's duty to maintain the pallets in good condition.

The Trial Judge found as a fact that the pallet and its appurtenances were free from all defects; were reasonably fit for their intended use and that Petitioner was injured solely by his own negligence and that of a fellow longshoreman who had improperly inserted the pallet bars and as a result thereof the loaded pallet was lifted unevenly thus causing cargo to spill and thereby strike the Petitioner [Pet's. App. C, p. 13a].

The Trial Court further found as a fact that the Respondent, Ca. Venezuelan Navigacion, had no knowledge of the manner in which Petitioner or his co-workers had improperly inserted the tongs of the pallet bars prior to the time the pallet was lifted and accordingly the Respondent, Ca. Venezuelan Navigacion, was not negligent nor was its vessel unseaworthy [Pet's. App. C, p. 13a].

The Circuit Court of Appeals sustained the District Court's holding that the credible testimony necessitated a finding that the pallets were not defective but on the contrary that the Petitioner and his co-workers caused the accident by placing the tongs of the pallet bars in the wrong holes and in addition thereto it held

that the Trial Court was justified in concluding that the pallets were reasonably fit for their intended use [Pet's. App. A. p. 4a].

ARGUMENT

POINT I

The authorities relied upon by the petitioner do not support his contention that this Court should grant his petition for a writ of certiorari.

In *Point I* of Petitioner's brief he urges that the decision of the Court below is inconsistent with this Court's holding in the case of *Gutierrez* v. *Waterman*, 373 U. S. 206, which stated that a shipowner would be held liable, irrespective of whether it had control of the area where the longshoreman was injured, when it knew or should have known that an accident might occur by reason of the existence of a dangerous condition which it failed to rectify.

The facts in *Gutierrez*, supra, are clearly distinguishable from the facts in this action in that there was no evidence that the Respondent, Ca. Venezuelan Navigacion, had any knowledge of an alleged defective condition which it failed to rectify, but, on the contrary, it was specifically found that the pallet was not defective. Accordingly, *Gutierrez* supra, has no application.

The Petitioner further argues under *Point II* of his brief that an inter-Circuit conflict exists between the Circuit Court's holding in this case and the Third

Circuit Court's holding in *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657. Petitions for a writ of certiorari are now pending before this Court in both *Ferrante* and *Thompson*, supra.

In *Thompson*, supra, the Circuit Court of Appeals for the Third Circuit held that the shipowner was liable for injuries sustained to the plaintiff-longshoreman when a dangerous method was employed in moving a gondola car from which cargo was to be loaded into the vessel. Evidence was introduced to prove that the same operation, to wit, the movement of the gondola car, could have been performed by four different methods or devices other than that used by the longshoremen, with safety. *Thompson*, supra, therefore is clearly distinguishable on the facts from the instant case in which no proof was offered that the ship could have been loaded by a method other than that which the Petitioner and his co-workers had employed throughout the entire loading operation of the vessel.

The *Ferrante* case, supra, likewise on its very facts must be distinguished from this action in that the Circuit Court for the Third Circuit found that Ferrante was injured because of an improper method by which the vessel was loaded. Again the distinction is clear between *Ferrante*, supra, and the instant case in that there was no criticism made of the method employed in the loading operation by the Petitioner and his co-workers. Therefore, the *Ferrante* decision, supra, must be strictly limited to its facts and it is clear that the holding in that case and in *Thompson*,

supra (the soundness of which is seriously doubted) must be narrowly construed.

The Court in *Thompson* and *Ferrante*, supra, based its findings solely on the fact that an improper method of loading or unloading cargo might give rise to unseaworthiness and such fact is not present in this action.

The holding of the Circuit Court of Appeals in this case is in accord with *Arena* v. *Luckenbach Steamship Company, Inc.*, 279 F. 2d 186 (1960) cert. denied 364 U.S. 895 (1960); *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (1962) cert. denied 371 U.S. 870 (1962); *Spinelli* v. *Isthmian Steamship Co.*, 326 F. 2d 870 (1964) cert. denied 377 U.S. 935 (1964).

The *Ferrante* case, supra, could be further distinguished on another separate ground, namely, that the Court held that the shipowner's officers knew or should have known that the cargo was being discharged in an unsafe manner. A close examination of the record in this case discloses that the shipowner's officers had absolutely no knowledge of the manner in which the longshoremen undertook to perform their duties [Pet.'s App. C. p. 13a].

The Petitioner also urges, as a ground for a review of this case by this Court in *Point III* of his brief, that a conflict exists between the holding of the Court in this case and the holding of the Circuit Court for the Second Circuit in the case of *Grillea* v. *U. S.*, 232 F. 2d 919.

In *Grillea*, supra, the Circuit Court held that the shipowner was liable for the injuries sustained by the

plaintiff because it had permitted a wrong hatch cover to be placed over a pad-eye of the vessel one day prior to the day on which the plaintiff stepped on the hatch cover whereby he was caused to suffer injuries. No such facts exist here. On the contrary, Petitioner's injuries were caused by a wrongful act of the Petitioner or his co-workers in creating a condition which was transitory as distinguished from the condition in *Grillea*, supra, which had existed for a period of at least one day prior to the accident.

Therefore, it cannot be urged that the decision in *Grillea*, supra, is in conflict with the Court's decision in this case as the facts are different.

POINT II

The stipulation entered into by counsel during the trial of the second action was solely limited to the testimony given by the petitioner in the prior trial of this action.

The Petitioner finally argues that a review of this case is warranted because the Court below committed an error in upholding the Trial Court which failed to give effect to a stipulation entered into among counsel at the first trial of this action.

Petitioner contends that on the first trial of the action a stipulation was entered into whereby the parties agreed that there were three empty pallets stacked together thus forming a platform and therefore the Trial Court was in error in disregarding

this stipulation and finding on the second trial that there were only two empty pallets in the supporting platform. The stipulation entered into between counsel for all parties on the first trial which referred to the number of empty pallets did not survive the second trial because it was specifically stipulated among all counsel at the second trial that Petitioner would be excused from testifying and that his prior testimony would be accepted into evidence. The stipulation was solely limited to Petitioner's testimony on the first trial and did not embrace or encompass any stipulation entered into by the attorneys on the previous trial.

The Court below correctly held that the stipulation on the second trial was limited to the previous testimony of Petitioner and no stipulation was entered into at the second trial that there were three empty pallets in the supporting platform [Pet.'s App. A. p. 3a].

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Of Counsel:
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